No. 12443.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

FILED
AUG 11 1950
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CLERK

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Jurisdictional Statement.

Appellant was indicted under Section 472 of Title 18, of the United States Code, on September 21, 1949 [R.[1] 2-2A]. The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles County, within the Central Division of the Southern District of California.[2] Judgment was entered on November 14, 1949 [R. 9-10]. Notice of Appeal was filed on November 15, 1949 [R. 10-11]. This Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

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[1]References preceded by the letter "R." are to the printed "Transcript of Record"; and those by "A. B." to Appellant's Opening Brief.

[2]The Indictment so charged [R. 2-2A]. Appellant does not attack on ground of lack of venue. Evidence supported it.

Statement of the Case.

On September 21, 1949, the Federal Grand Jury at Los Angeles returned an Indictment against Appellant in two counts, which was filed on that day in the United States District Court for the Southern District of California, Central Division [R. 2-2A]. Count One of the Indictment charged Appellant with keeping in his possession and concealing 150 falsely made, forged and counterfeited United States ten dollar treasury notes with intent to defraud, knowing the same to be falsely made, forged, and counterfeited. Count Two of the Indictment charged Appellant with passing, uttering, publishing, and selling, and attempting to pass, utter, publish and sell, the said notes to John William Wyatt, with intent to defraud, knowing the same to be falsely made, forged and counterfeited.

On October 3, 1949, Appellant pleaded not guilty to both counts [R. 3]. Trial was commenced before a jury on November 1, 1949 [R. 14]. The jury found the Appellant guilty on both counts on November 2, 1949 [R. 116]. Appellant's motion for a new trial was denied on November 14, 1949 [R. 8].

On November 14, 1949, the Appellant was sentenced to imprisonment for two years on Count One and two years on Count Two, the sentence on Count Two to be consecutive to the sentence on Count One [R. 10]. Notice of Appeal was filed on November 15, 1949 [R. 10-11].

The Statute Involved.

Section 472 of Title 18, United States Code provides:

> "Whoever with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000.00 or imprisoned not more than fifteen years, or both."

The Facts.

On August 26, 1949, Bonnie Ruth Wyatt was arrested in Pasadena for passing a counterfeit ten dollar bill at Nash's Department Store. She took the arresting officers to a locked, parked automobile nearby and when the automobile was opened, numerous counterfeit $10.00 notes were found [R. 41-42, 59-60]. Agents Wasson, Carli, of the Los Angeles Office of the Secret Service were called to Pasadena and participated in the investigation there. A search of Bonnie Wyatt revealed that she had in her possession a number of counterfeit $10.00 notes. Notes found in the automobile and those found on the person of Bonnie Wyatt all bore the same serial number [R. 61].

On August 29, 1949, John William Wyatt, husband of Bonnie Wyatt, surrendered to Agents of the United States Secret Service in Los Angeles. He told the agents he had met a man named "Jim" in a Los Angeles barroom, about August 21, 1949, and had been approached

by "Jim" with a proposition whereby "Jim" would furnish him with counterfeit banknotes to pass and they would split the profit on the returns. Later Wyatt agreed to the proposition, took delivery of 150 $10.00 notes from "Jim" on the morning of August 26, 1949, and after borrowing his brother-in-law's car, set out with his wife, Bonnie, to pass the notes. They passed notes in Whittier, El Monte and Alhambra before Bonnie was arrested. John Wyatt furnished the agents with the license number of "Jim's" car which he had noted on one of his meetings with "Jim" [R. 16-26].

Agents Carli, Swinney, and Schnellback located Schiros at his ice cream shop at 526½ South Hill Street, Los Angeles, on August 29, 1949, and placed him under arrest. On the evening of that day John Wyatt and Carl Schiros were brought face to face, at which time Wyatt said he recognized Schiros as "Jim" who had furnished him the notes. Agents present state that Schiros first denied knowing Wyatt when shown a picture of Wyatt, but later, when confronted by Wyatt, admitted that he had met Wyatt before [R. 63-65, 68-69, 78-79, 101-102]. Schiros called at Johnnie's Cafe in Whittier, California, in the evening of August 26, 1949, in company with Eleanor Shaw, sister of John Wyatt. Wyatt's mother-in-law and brother-in-law were employed in this cafe which was frequented by Wyatt and his wife. Arresting agents state that at the time of his arrest Schiros denied knowing Eleanor Shaw [R. 46-55-56, 63].

Carl Schiros denied giving Wyatt any $10.00 notes and denied ever meeting Wyatt in a bar [R. 91]. He

stated it was dark on August 29, 1950, when the agents asked him if he recognized a picture of John Wyatt [R. 95], and that he immediately recognized Wyatt and so stated to the agents, when confronted by John Wyatt on the evening of his arrest, August 29, 1949 [R. 92, 95].

Summary of Argument.

The argument is divided into 4 parts. (1) The first part is in reply to Appellant's contention that no *corpus delicti* was proven on the trial, (2) the second part demonstrates that there was sufficient competent evidence to support a guilty verdict, (3) the third part answers Appellant's attack on the instructions to the jury, and his contention that certain necessary instructions were omitted, (4) the fourth part answers Appellant's assertion that the sentence was illegal, in that both counts of the Indictment embrace but one crime.

ARGUMENT.

I.

There Was Sufficient Proof of the Corpus Delicti.

Appellant states in his brief (A. B. 2) that the trial court erred in submitting the case to the jury before a proper *corpus delicti* was proven. He also speaks in his brief of "the necessity of establishing a *corpus delicti* before defendant's admission would be admissible" (A. B. 4), without specifying just what amounts to an admission by the defendant in the Transcript of Record. A search of the authorities reveals no rule requiring establishment of a *corpus delicti* before a defendant's admission would be admissible, although there is some authority for a rule that antecedent to the receipt of a confession, the prosecution must prove the *corpus delicti. Vogt v. United States,* 156 F. 2d 308, 310. Admissions of Appellant first appear during the testimony of Agent Carli [R. 65]. The *corpus delicti* was proven considerably before that stage of the trial, as will be shown.

The question of whether a *corpus delicti* has been proven almost always arises when the prosecution's case has rested to some extent on a confession or on admission of the defendant. *United States v. Di Orio,* 150 F. 2d 938; *Pines v. United States,* 123 F. 2d 825; *Vogt v. United States,* 156 F. 2d 308; *Evans v. United States,* 122 F. 2d 461. In fact, the Government found no cases where the question was raised in any other situation. In the *Evans* case, cited above, the Court gave expression to the general rule as follows:

> "It is the law that unless corroborated by independent evidence of the *corpus delicti,* the extra-

judicial confession or declarations of a defendant charged with crime are not sufficient to authorize a conviction."

A good definition of *corpus delicti* appears in the *Vogt* case, cited above, at page 310 of the report, where the Court adopts the definition in 14 Am. Jur. 758, Sec. 6, which is as follows:

> "Generally spaeking, the term *'corpus delicti'* means, when applied to any particular offense, that the specific crime charged has actually been committed by someone. It is made up of two elements: (1) That a certain result has been produced, for example, a man has died or a building has been burned; and (2) that some person is criminally responsible for the act. It has been said that the *corpus delicti* consists of the facts that a crime has been committed and that the defendant was implicated in the crime. This definition, however, is inaccurate, since if true, all that would be necessary to convict of a crime would be to prove the *corpus delicti.*"

Although the argument of Appellant with respect to the *corpus delicti* is not set out with clarity in his brief, an examination of the evidence indicates that any argument on that score by Appellant is untenable. Applying the definition set out above to evidence in this case, we find ample to establish a *corpus delicti.* The testimony of John Wyatt is sufficient in itself for that purpose [R. 15-37]. His testimony shows possession by someone of counterfeit ten dollar notes on August 26, 1949, in Los Angeles County [R. 20, 33], and shows further that this same person aided, assisted, induced, and procured Wyatt to utter and pass the same notes. The actual counterfeit nature of the notes is shown by Wyatt's testimony that he was arrested and convicted for his possession of them

[R. 25, 26, 37]. In addition to John Wyatt's testimony, we have that of Mrs. Wyatt, which corroborates portions of the testimony of Mr. Wyatt [R. 39-44], and that of Agents Carli and Schnellback, which confirm the counterfeit nature of the money described by Mr. and Mrs. Wyatt [R. 59-80]. Of course, other testimony and evidence identified Schiros as the subject of John Wyatt's Testimony, linking him to the *corpus delicti,* but this aspect of the evidence will be considered properly in the next part of the argument.

Any consideration of the sufficiency of the evidence proving the *corpus delicti* must take into account the rule as to the weight of evidence necessary for its establishment. It is set out in *Flower v. United States,* 116 Fed. 241, at page 246, in this language:

> ". . . full proof of the body of the crime,—the confession, is not required by any of the cases, and in many of them slight corroborating facts were held sufficient."

II.

There Was Sufficient Competent Evidence to Support the Verdict.

After conviction, the Court of Appeals, in determining whether the evidence was sufficient to support conviction, will not weigh evidence or determine credibility of witnesses, but will take that view of evidence with inferences reasonably and justifiably to be drawn therefrom, most favorable to the Government.

Myers v. United States, 6 Cir., 94 F. 2d 433, cert. den. 304 U. S. 583, rehearing denied 305 U. S. 670;

Glasser v. United States, 315 U. S. 60;

Henderson v. United States, 143 F. 2d 681.

There is a suggestion in Appellant's brief (A. 2), that the testimony of John Wyatt, an admitted wrongdoer, was not competent. But it is clear that the jury by its verdict rejects as unworthy and accepts as worthy the testimony of various witnesses, and when the jury has made its choice, by its verdict, the Appellate Court is bound thereby. In *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 9 Cir., at page 380, this Court said:

> " 'To clarify the matter for once and for all, we wish to restate plainly that this Court is not concerned with the weight of the testimony adduced below. Questions of credibility were for the trial court.' "

The only question presented, then, is whether, viewed in the light most favorable to the Government, there was any substantial evidence to support the verdict. In this regard the Government directs attention to its brief treatment of evidence in the argument on *corpus delicti* above. Evidence which identifies Schiros as the criminal agent is convincing and ample. There is the testimony of John Wyatt, naming Schiros. There is the testimony of Carli and Schnellback concerning the Appellant's denials in an attempt to disassociate himself with the crime, and his subsequent admissions that he knew Wyatt, Marie Taylor, and had been to Johnny's Cafe and to the Wyatt house at 7219 Whitsett Avenue, Los Angeles [R. 63, 65, 66-67].

On appeal from conviction on the ground of errors relating to the sufficiency of the evidence to support the verdict, the duty of the Court of Appeals is limited to the determination of whether there was any substantial evidence to sustain the verdict. *O'Leary v. United States,* 9 Cir., 160 F. 2d 333. There was sufficient evidence here.

III.

No Error Was Committed by the Court in Its Charge to the Jury.

A.

Appellant cites as error the Court's charge to the jury [R. 112] which is as follows:

> "An accomplice is a person who has knowingly participated in the acts charged as constituting the offense. John and Bonnie Ruth Wyatt are accomplices. The testimony of an accomplice should be scrutinized carefully by the jury and you should act upon the testimony of an accomplice with caution and care."

Appellant contends that the instruction tended to give the jury the idea that Schiros was the one they were accomplices with. It is strange that Appellant should attack an instruction which admonishes the jury to "act upon the testimony" of the Wyatts with caution and care. To read into the instruction the inference suggested by Appellant would be a distortion difficult to conceive. The instruction benefits Appellant, and his attack is without merit. It is probably error to omit the instruction in cases where accomplices have testified.

The case relied upon by Appellant, *United States v. Monroe,* 164 F. 2d 471 (A. B. 8), doesn't support his assertion of error. In that case the Appellant objected to an instruction which designated another as a co-conspirator on the ground it took from the jury the consideration of a vital factor in a conspiracy trial. The case is not in point.

B.

Appellant contends that "the Court failed to fully explain the real issues in the case as to the meaning of Section 472 of Title 18 . . ." (A. B. 3). In support of this contention the Appellant cites *United States v. Man,* 156 F. 2d 13, at page 16, and *United States v. Noble,* 155 F. 2d 315 (A. B. 8).

Once again the Appellant has cited cases which lend no support to his argument. In the *Man* case the Appellants claimed the Court "erred in that it failed to inform the jury of the issues involved and of the essentials of the crimes for which the defendants were tried." The Court, at page 15, disposed of his claim of error by pointing out that, "The charge covered the necessary general elements with clarity and was meticulously fair." In the *Noble* case the Court of Appeals of the Third Circuit reversed a conviction on the grounds that the trial court failed to instruct the jury on the essential elements of the crime charged. On page 316 the Court of Appeals stated:

> "We think it is self-evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime committed."

Appellant's cases hold that the Court must instruct the jury as to the elements of the crime or crimes charged. That is precisely what the Court did in the instant case [R. 109, 110]. The instructions as to each count were indeed meticulous.

C.

The Appellant contends that the Court erred in that it failed to fully enlighten the jury as to the effect of the presumption of innocence (A. B. 3). This is not so. Had the Court done more in this direction it would have approached redundancy. On pages 108 and 109 of the Transcript of Record appears a most complete instruction in that regard, beginning with the sentence, "The law does not require any defendant to prove his innocence, which, in many cases, might be impossible . . ." And at the top of page 112 of the Transcript of Record we have the familiar and accepted instruction on the burden of proof in criminal cases.

D.

The Appellant objects to an instruction on page 111 of the Transcript of Record but qualifies his objection by stating that the instruction is objectionable unless proof shows that defendant aided and abetted in the commission of the alleged crime (A. B. 4). Subject instruction is as follows:

> "In a case where two or more persons are engaged in the commission of a crime, the guilt of the accused may be established without proof that the accused did every act constituting the offense."

This instruction is a preface to a recitation of Section 2(a) and 2(b) of Title 18, United States Code, which provisions have the effect of enlarging the potential field of principal offenders against the laws of the United States. The instruction is a correct statement of law when given in conjunction with the Sections which follow it. Even if we were to accept Appellant's qualification, the evidence shows Schiros as one counseling, inducing, procuring and causing the unlawful activity with which he is charged in Count Two of the Indictment.

E.

Appellant asserts that an instruction appearing on page 112 of the Transcript of Record constituted prejudicial error in that the Court did not limit its application to facts or circumstances material to the issue involved and failed to instruct on the role of *corpus delicti* in regard to defendant's admissions (A. B. 4). The instruction is as follows:

> "In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant as well as the declarations and admissions, if any."

No qualifying language was needed. The scope of the jury's consideration was properly defined by the phrase. "facts and circumstances *in the case*" (emphasis added). If the facts and circumstances are part of the case, *i. e.*, the evidence, they would be proper to consider if they touch the conduct of defendant.

No instruction concerning *corpus delicti* would be improper. It is a matter of law for decision of the Court.

In concluding this discussion of Appellant's attack on the Court's instructions, it should be noted that defense counsel interposed no objection to the instructions when given the opportunity by the Court [R. 114-115]. It is clear that under the provisions of Rules 30, 52 of the Federal Rules of Criminal Procedure (Sec. 687 ff., Title 18, U. S. C.), where no exception is taken to instructions, the Appellate Court will not consider alleged error in instructions unless substantial prejudice resulted. If there be error in the instructions, either in the giving or in the omission, in this case, it was not fundamental, resulting in substantial prejudice to the Appellant.

IV.

Under the Provisions of Section 472 of Title 18, United States Code, Several Distinct Offenses Are Provided for.

The Appellant contends that consecutive sentences given him are improper because possession and utterance are the same offense under Section 472 of Title 18, United States Code (A. B. 6). This same argument was advanced by the Appellant in *Ross v. Hudspeth,* 108 F. 2d 628. In that case Appellant was tried under a four count indictment charging him with uttering and with possessing two different notes. He claimed, on appeal, that Count One, which charged uttering, and Count Two, which charged possessing the same note, charged but one offense. But the Court rejected this argument and held that the statute (then Sec. 265 of Title 18, U. S. C.) defined two groups of offenses, saying at page 629:

> "It is obvious that the statute defines two groups of offenses: (1) passing, uttering, publishing, or selling a falsely made, forged, counterfeited, or altered obligation of the United States; with intent to defraud, and (2) bringing into the United States, possessing, or concealing, with intent to defraud, a falsely made, forged, counterfeited, or altered obligation of the United States, with intent to pass, publish, alter, or sell the same, . . ."

The maximum sentence which could have been imposed on Appellant was twenty years imprisonment and $10,000 fine. There is no illegal sentence here nor is there hardship.

Conclusion.

The crimes here charged were passing, uttering, publishing, and selling and attempting to pass, utter, publish and sell, with intent to defraud; and keeping in possession and concealing with intent to defraud, 150 counterfeit ten dollar notes. The statute under which the Indictment was brought is sufficient. The evidence points positively to guilt. The Court's instructions were proper and sufficient. The sentence was correct. Judgment below should be affirmed.

Respectfully submitted,

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